## RE CHAN BOON HENG; EX P ASSOCIATED TRACTORS SDN BHD

HIGH COURT MALAYA, ALOR STAR
MOHD SOFIAN ABD RAZAK J
[BANKRUPTCY NO: 29-915-2005]
30 DECEMBER 2008

***BANKRUPTCY:*** *Notice - Setting aside - Appeal against setting aside of bankruptcy notice and creditor's petition - Limitation period - Leave to issue - Final judgment - Applicability of 6(3) Limitation Act 1953 to bankruptcy proceedings - Rules of the High Court 1980, O. 46 r. 2 - Bankruptcy Act 1967, s. 3(1)(i)*

This was an appeal by the judgment creditor against the deputy registrar's decision allowing the judgment debtor's application to set aside and/or annul the bankruptcy notice and creditor's petition with costs. The bankruptcy notice, which was filed in court on 30 August 2005, was based on a judgment that was obtained on 17 February 1994. In the context of the relevant limitation period, the following issues required determination: (i) whether leave had to be obtained to issue a writ of execution pursuant to O. 46 r. 2 of the Rules of the High Court 1980 ('RHC') if the judgment had lapsed after six years or more; (ii) whether, if no leave had been obtained, the judgment creditor had a final judgment within the meaning of s. 3(1)(i) of the Bankruptcy Act 1967 ('Act'); and (iii) whether s. 6(3) of the Limitation Act 1953 ('LA') was relevant and applicable to bankruptcy proceedings.

**Held (allowing the appeal):**

**(1)** Insofar as the interpretation of O. 46 r. 2 of the RHC is concerned, it only applies to a writ of execution to enforce a judgment, and a bankruptcy notice or petition cannot be a 'writ of execution'. In this regard, no leave is required to issue a bankruptcy notice or creditor's petition. (para 17)

**(2)** The answer to (ii) was that since leave is not required to issue a bankruptcy notice and creditor's petition within the meaning of O. 46 r. 2 of the RHC, it followed that the said judgment obtained must necessarily mean that it was a final judgment within the meaning of s. 3(1)(i) of the Act. (para 18)

**(3)** Section 6(3) of the LA applies to bankruptcy proceedings and while such proceedings may be brought within 12 years of the date of judgment, arrears of interest may only be claimed for a period of six years from the date of judgment. *Perwira Affin Bank Bhd v. Lim Ah Hee* (foll). In the instant case, the 12 years limitation as envisaged by s. 6(3) of the LA would be the date of judgment *ie*, 17 February 1994 and 12 years thereafter expired on 17 February 2006. Since the bankruptcy notice was issued on 30 August 2005, it was still within the 12-year limitation period but the arrears on interest may only be claimed for a period of six years from the date of the judgment *ie*, until 17 February 2000. (paras 32 & 33)

**Case(s) referred to:**

*Chin Sin Lan v. Delta Finance Bhd [2004] 3 CLJ 113 CA* ***(refd)***

*Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC* ***(foll)***

*Re Ahmad Lazim & Anor; ex p Bank Kerjasama Rakyat (M) Bhd [1999] 2 CLJ 101 HC* ***(refd)***

*Re Ang Swee Hian; ex p Avenue Securities Sdn Bhd [2008] 1 LNS 216* ***(refd)***

*Re Lee Che Peh; ex p Tractors Malaysia (1982) Sdn Bhd [2003] 2 CLJ 365 HC* ***(refd)***

*Re Shuib Hj Ibrahim; ex p BPK Credit & Leasing Sdn Bhd [2003] 3 CLJ 679 HC* ***(refd)***

*Tg Iskandar Tg Ahmad v. Sime Bank Berhad [2001] 7 CLJ 560 HC* ***(refd)***

*V Gopal, Re ex p Bank Buruh (M) Bhd [1987] 1 CLJ 602; [1987] CLJ (Rep) 602 HC* ***(refd)***

*Wee Chow Yong; Ex p Public Finance Bhd [1990] 1 CLJ 176; [1990] 3 CLJ (Rep) 349 HC* ***(refd)***

*WT Lamb & Sons v. Rider [1948] 2 KB 331* ***(refd)***

**Legislation referred to:**

Bankruptcy Act 1967, s. 3(1)(c), (i), (2)(ii)
Limitation Act 1953, ss. 2, 6(3)
Rules of the High Court 1980, O. 46 r. 2(1)(a)

Limitation Act 1939 [UK], s. 2(4)
Rules of the Supreme Court [UK], O. 42 r. 23(a)

*For the judgment creditor - M/s M Pathmanathan & Co*
*For the judgment debtor - M/s Thaiyub Khan Othuman & Co*

*Reported by Suresh Nathan*

## JUDGMENT

**Mohd Sofian Abd Razak J:**

**[1]** Enclosure 15 is the judgment creditor's appeal to judge in chambers against the learned deputy registrar's decision given on 20 March 2007 allowing the judgment debtor's application to set aside and/or annul the bankruptcy notice and creditor's petition with costs (encl. 6).

**[2]** When the matter came up for hearing on 19 September 2007, parties were directed to put in their respective written submissions together with the bundle of authorities, which the parties duly complied with.

**[3]** The crux of the prayers sought before the learned deputy registrar by the judgment debtor in encl. 6 *inter alia* are as follows:

(i) that the bankruptcy notice dated 30 August 2005 be set aside and/or annual with costs.

(ii) a declaration that the judgment debtor did not commit an act of bankruptcy as a result of the failure to fulfil the requirement of the bankruptcy notice.

(iii) that the creditor's petition dated 12 December 2005 be set aside and/or annul with costs.

(iv) any other order deemed fit by the Honourable Court.

Among the reasons as stated in encl. 6 *inter alia* is:

(a) that the said bankruptcy notice was defective because the execution on the judgment dated 19 February 1994 was stayed in accordance with s. 3(1)(i) of the Bankruptcy Act 1967.

### Submission By The Judgment Debtor

**[4]** The learned counsel for the judgment debtor submitted that the bankruptcy notice was filed based on a judgment which was obtained on 17 February 1994 Accordingly as at the date the bankruptcy notice was filed in court ie, on 30 August 2005, it was more than six years and the judgment creditor should have obtained leave to execute on the judgment.

**[5]** Order 46 r. 2(1) of the Rules of the High Court 1980 (hereinafter called 'RHC' 1980) stipulates as follows:

> **Order 46. Writs of Execution: General Rule 1. Definition. (Order 46 r. 1)**
>
> In this Order, unless the context otherwise requires 'writ of execution' includes a writ of seizure and sale, a writ of possession and a writ of delivery.
>
> **Rule 2. When leave to issue any writ of execution is necessary. (Order 46 r. 2)**
>
> (1) A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say:
>
> (a) Where six years or more have lapsed since the dated of the judgment or order.

**[6]** In support of this contention, the learned counsel for the judgment debtor referred to the case of *Wee Chow Yong; Ex p Public Finance Bhd* [1990] 1 CLJ 176; [1990] 3 CLJ (Rep) 349 HC where Edgar Joseph Jr. stated as follows:

> To my mind it is not unfair summary of the position in the UK to say that a creditor can issue a bankruptcy notice only when he has obtained a final judgment or final order. The judgment or order must be one on which the creditor is in a position to issue execution so that if execution cannot be issued at all, no bankruptcy notice can be issued. If the execution can be issued only with the leave of the Court, the creditor must obtain such leave before he can issue a bankruptcy notice.

**[7]** Further in *V Gopal, Re ex p Bank Buruh (M) Bhd* [1987] 1 CLJ 602; [1987] CLJ (Rep) 602 HC the court held that:

> (1) On the date that the bankruptcy notice was served on the debtor, the creditor did not have a judgment on which execution could be proceeded with since to do so, by Order 46 r. 2(1)(a) leave of the Court had first to be obtained and that therefore on the date the creditor did not have a final judgment within the meaning of Section 3(1)(i).

(2) On the day that the bankruptcy notice was served since 6 years had lapsed from the date of the judgment, the petitioner was not entitled to enforce the judgment as he had not obtained the requisite leave as prescribed by Order 46 r. 2(1)(a).

**[8]** In the case of *Re Ahmad Lazim & Anor; ex p Bank Kerjasama Rakyat (M) Bhd* [1999] 2 CLJ 101, where Clement Skinner JC had said that:

[6] The issuance of a bankruptcy notice is not execution to enforce a judgment. However, if more than six years have elapsed since a judgment is obtained, and leave has not been obtained to execute that judgment, the judgment creditor cannot be described as being in a position to issue execution on that judgment. If execution can be issued only with leave of the court, such leave must be obtained before a bankruptcy notice can be issued thereon.

[6a] The reason leave is required in such a situation is because the words "and execution thereon not having been stayed" appearing in s. 3(1)(i) of the Bankruptcy Act 1967 mean that a judgment creditor must not merely have obtained a final judgment but must be in position to issue execution upon it.

[7] The respondent did not show that it was in a position to issue execution on the judgment when the present bankruptcy notice was issued. Such notice was therefore irregularly issued.

[7a] The irregularity had resulted in the present bankruptcy notice being issued and served on the appellants when it should not have been issued in the first place. The legal consequence of such service on the appellants was that if they did not within seven days respond in the manner indicated in the bankruptcy notice, they would have committed an act of bankruptcy. That act of bankruptcy became available not only to the respondent but to any other creditor of the appellants to present a bankruptcy petition on. Thus, the appellants had suffered substantial injustice which could only be remedied by an order invalidating the bankruptcy notice by setting it aside.

**[9]** Further in the case of *Re Shuib Hj Ibrahim; ex p BPK Credit & Leasing Sdn Bhd* [2003] 3 CLJ 679 where Vincent Ng J had said that:

> On the question of whether bankruptcy is a form of execution proceedings, I had occasion to express the following view in *Tan Ah Tong v. Dato' Seri Dr. Kuljit Singh* [2002] 6 CLJ 484 at p. 490:
>
> Obviously, the six year rule is intended to discourage the judgment creditor – who is expected to act with vigour to recover the fruits of litigation – from holding the Sword of Damocles over the head of the judgment debtor for an indefinite and inordinate number of years. This must be so as a bankruptcy action being an execution *in pesonam* is by far a more impartial and traumatic event (entailing a gamut of personal restrictions) on the judgment debtor than an execution *in rem* against his property.
>
> I am of the considered view that bankruptcy proceedings are also caught within the strictures in O. 46 r. 2(1)(a) of the Rules of the High Court 1980 (RHC), as O. 45 r. 1(3) thereof provides that "enforcement (or execution) of a judgment or order" (under O. 46 r. 1) also includes enforcement under "the written law relating to bankruptcy or to winding-up of companies". Order 46 r. 2(1)(a) is a discretionary bar which may be hurdled by the court's leave being obtained. See *Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd* [1990] 1 CLJ 176; [1990] 3 CLJ (Rep) 349. Consequently, leave of the court ought to be secured should a bankruptcy notice be filed after six years from the date judgment is obtained. It must be noted that as over six years had elapsed after the default judgment was obtained the JC have safeguarded their execution proceeding when they ensured that leave was obtained under O. 46 r. 2(1)(a) to commence the bankruptcy proceeding.

**[10]** In case of *Tg Iskandar Tg Ahmad v. Sime Bank Berhad* [2001] 7 CLJ 560 where Suriyadi Halim Omar J had given his decision that:

> To wind up the sub-issue, and risking reiteration, after having considered the matter from every relevant aspect, I have no compunction in concluding that bankruptcy actions do come within the ambit of O. 46 r. 2(1)(a). Parliament has clearly seen it fit to deliberately advert to the term "include", and subject to the canon of construction, it is trite that this word in its ordinary meaning is not exhaustive. It is diametrically opposed to words like "means" which permits a hard and fast definition. Needless to say, the terminology "include" is generally used in interpretation

clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute (Interpretation of Statutes by Bindra). Apart from that, I failed to identify any term, provision or cogent reason that explicitly or implicitly exclude bankruptcy proceedings from being covered by this provision, subject to all the conditions being met.

With the above mentioned O. 46 r. 2(1)(a) at the back of my mind, I would not hesitate to conclude that if more than six years have elapsed since the date of final judgment or order, any act to issue a writ of execution must require court's leave. No doubt if that judgment or order were yet to be final or leave was yet to be obtained, then at the stage of issuing the BN, the JC could not said to be described as being in a position to issue a writ of execution.

Statutorily, what is undeniable is that a bankruptcy notice cannot stand on its own, but can only be issued if a final judgment or final order of a court exists. This is so as under s. 3(1)(i) of the Bankruptcy Act 1967 a debtor commits an act of bankruptcy, *inter alia*, if a creditor has obtained a final judgment or final order against him. This requirement is restated under r. 92(a) of the Bankruptcy Rules where, when applying for the issuance of a bankruptcy notice, an applicant creditor is required to produce before the Registrar an office copy of the judgment or order on which the notice is found (*Re Mohamad Fadzimi Yaakub ex p UMBC* [1998] 1 CLJ 783). Apart from the above statutory requirement, if execution had been stayed in the like of a prior issuance of writ of seizure and sale, a writ of possession and writ of delivery, the creditor would likewise be in the same predicament, thus preventing him from filing that bankruptcy notice (s. 3(1)(i) of the Bankruptcy Act; *Re Woodall* [1884] 13 QBD 479).

**[11]** Referred to the case of *Chin Sin Lan v. Delta Finance Bhd* [2004] 3 CLJ 113 Court of Appeal, Kuala Lumpur (Civil Appeal No: Q-03-11-2001) where Gopal Sri Ram JCA, Alauddin Mohd Sheriff JCA, Richard Malanjum JCA had given their decisions that:

To re-iterate, following the foregoing two decisions, a creditor who has obtained a judgment and sat on it for more than six years in West Malaysia must obtain leave of Court before he can commence bankruptcy proceedings under s. 3(1)(i) of the Bankruptcy Act.

**[12]** The learned counsel for the judgment debtor further stated that on 3 December 2002 the judgment creditor obtained leave to issue writ of execution which was valid for a period of 12 months and in the instant case the bankruptcy notice was not issued within the said period. Reference was made to the case of *Re: Lee Che Peh; ex-parte Tractors Malaysia (1982) Sdn Bhd* [2003] 2 CLJ 365 where the court held that '... a proper interpretation of s. 3(1)(c) of the Bankruptcy Act 1967 and O. 46 r. 2(1)(a) of the RHC 1980, the judgment creditor is required to comply with this mandatory requirement of obtaining leave for the purpose of issuing the impugned bankruptcy notice.'

## Submission By The Judgment Creditor

**[13]** The learned counsel for the judgment creditor in his written submission had urged the court to consider only one issue that is whether O. 46 r. 2 of the RHC 1980 applied to a judgment creditor who wishes to take out bankruptcy notice pursuant to a judgment that is more than six years. The learned counsel for the judgment creditor was of the view that O. 46 r. 2 of the RHC 1980 is not applicable to bankruptcy proceedings as it is expressly limited to a judgment creditor who wishes to initiate/institute execution proceedings.

**[14]** To fortify its argument, reference was made to the case of *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787 at p. 797 where Abdul Hamid Mohamad FCJ (as he then was).

> Furthermore, if we bear in mind that the words used in our Order 46 r. 2 RHC and in the English Rules are 'A writ of execution to enforce a judgment ... Clearly a bankruptcy notice or a bankruptcy petition cannot be 'a writ of execution.' So, in my view, our courts have been correct in holding the view that no leave of court is necessary to issue a bankruptcy notice after six years as required by Order 42 r. 2 RHC.

**[15]** The learned counsel for the judgment creditor further submitted that the earlier decisions on the point of law by the High Court and the Court of Appeal had been overruled by the Federal Court and are bad in law and inapplicable.

## Findings Of The Court

**[16]** In discussing the legal issues before the court, there are three issues which needs to be analysed in the context of the limitation period mentioned therein. The three issues are:

i) whether leave had to be obtained to issue a writ of execution pursuant to O. 46 r. 2 of RHC if judgment had lapsed after six years or more;

(ii) whether if no leave was obtained pursuant to O. 46 r. 2 of RHC did the judgment creditor have a final judgment within the meaning of s. 3(1)(i) of the Act;

(iii) whether s. 6(3) of the Limitation Act 1953 was relevant and applicable to bankruptcy proceedings.

**[17]** On the first issue, the court agrees with the submission by the learned counsel for the judgment creditor that in so far as the interpretation of O. 46 r. 2 RHC is concerned, it only applies to a writ of execution to enforce a judgment and bankruptcy notice or a bankruptcy petition cannot be a 'writ of execution'. In this regard no leave is required to issue a bankruptcy notice or creditor's petition.

**[18]** On the second issue, the answer is that since leave is not required to issue a bankruptcy notice and creditor petition within the meaning of O. 46 r. 2 of RHC 1980, it follows that the said judgment obtained must necessarily mean that it was a final judgment within the meaning of s. 3(1)(i) of the Act.

**[19]** On the third issue, which was one of the two questions posed at the Federal Court in *Perwira Affin Bank Bhd v. Lim Ah Hee (supra)* where the court held that the word 'action' in s. 6(3) of the Limitation Act did not include a bankruptcy proceeding and it was also not a 'suit' which was one of the words used in the definition of 'action' in s. 2 of the Limitation Act. Nevertheless, the definition of 'action' in s. 2 of the Limitation Act includes a bankruptcy proceeding which is premised upon a judgment and therefore comes within the ambit of s. 6(3) of the Act, where a bankruptcy proceeding may be brought within 12 years of the date of judgment but arrears of interest may only be claimed for a period of six (6) years from the date of the judgment.

**[20]** It is perhaps pertinent to recall the brief facts of *Perwira Affin Bank Bhd (supra)* which are as follows:

> The judgment creditor obtained judgment against the judgment debtor on 23rd October 1987. On 28th March 1996, the judgment creditor took out a bankruptcy notice ('BN') and served it on the judgment debtor on 3rd June 1996. The judgment debtor served on the judgment creditor a notice under s. 3(2)(ii) of the Bankruptcy Act 1967 ('BA') alleging that the BN was in correct and excessive. At the hearing of the appeal before the High Court judge, the judgment debtor's counsel orally raised a preliminary objection that the sum demanded in the BN was wrong as it included a statute – barred debt. The High Court judge dismissed the judgment debtor's preliminary objection. The Court of Appeal allowed the judgment debtor's appeal. The judgment creditor applied for leave to appeal to the Federal Court against the decision of the Court of Appeal.

**[21]** The Federal Court granted leave to the judgment creditor to appeal and to pose two questions namely:

(a) whether the second limb of s. 6(3) of the Limitation Act 1953 was relevant and applicable to bankruptcy proceedings.

(b) whether the BN was valid under s. 3(2)(ii) of the Bankruptcy Act if the judgment did not dispute that the claim stated in the BN was excessive within seven (7) days from the date of service of the BN.

**[22]** Section 6(3) of the Act states that 'an action upon any judgment shall not be brought after the expiration of 12 years from the date on which the judgment because enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date of which the interest became due.'

**[23]** On the second question, which was not raised in the High Court, was raised by the judgment creditor in the Court of Appeal. The Court of Appeal held that it was too late for the judgment creditor to raise the objection.

**[24]** In *Perwira Affin Bank Bhd v. Lim Ah Hee (supra)* Abdul Hamid Mohamed FCJ discussed the decision in the case of *WT Lamb & Sons v. Rider* [1948] 2 KB 331. The case is not a bankruptcy case. It was a case where the plaintiff having obtained

judgment had applied for leave to proceed to execution to enforce the judgment notwithstanding that six years had lapsed since judgment was entered. The application was made pursuant to Rules of the Supreme Court O. 42 r. 23(a) which provides that where six years have elapsed since the date of the judgment, the party alleging himself to be entitled to execution may apply to court or a judge for leave to levy execution. The argument put forward was that RSC O. 42 r. 23(a) was invalid as it was in conflict with s. 2(4) of the (English) Limitation Act 1939.

**[25]** The provisions of O. 42 r. 23(a) RSC is similar to the provisions of O. 46 r. 2(1) RHC.

**[26]** The Court of Appeal rejected that argument and held that O. 42 r. 23(a) RSC was not rendered invalid by the provisions of s. 2(4) of the (English) Limitation Act 1939. The court drew a distinction between execution in O. 42 r. 23(a) and the word 'action' in s. 2(4) of the Limitation Act 1939. The court held that O. 42 r. 23(a) dealt solely with execution which is essentially a matter of procedure for the purpose of enforcing a judgment when obtained. On the other hand, s. 2(4) of the Limitation Act 1939 is concerned with the right to sue on a judgment. A plaintiff who has obtained a judgment more than six years is not entitled to issue execution on it except with the leave of the court, or a judge as provided by O. 42 r. 23(a).

**[27]** At p. 800 of *Perwira Affin Bank Bhd v. Lim Ah Hee (supra)* the two questions distilled from the first question when leave to appeal was granted are:

(i) whether a bankruptcy proceeding is an 'action' within the meaning of s. 6(3) of the Limitation Act 1953 as defined in s. 2 of the same Act.

(ii) whether the 'two limbs' of s. 6(3) should be read disjunctively or conjunctively.

**[28]** I am in full agreement with the reasoning by Abdul Hamid Mohamed FCJ that a bankruptcy proceeding is not 'a writ of execution' within the meaning of O. 46 r. 2 RHC 1980. Equally it does not necessarily mean that it is 'an action upon any judgment' in the light of the definition given in s. 2 of the Limitation Act 1953 which includes a 'suit' or any other proceeding.'

**[29]** The court also viewed that an execution is a proceeding in court and concur with the learned judge that an execution is the continuation of the existing proceedings to enforce the judgment provided by the same rules of court namely RHC. However, in respect of bankruptcy proceedings are governed by separate law and rules, the focus being the judgment debtor, not the debt and the object is to appoint a receiver in person of the official assignee. A bankruptcy proceeding is by way of petition and it bears the characteristics of a fresh proceeding unlike an execution proceeding.

**[30]** In the unreported case of *Ang Swee Hian; ex-parte Avenue Securities Sdn. Bhd.* [2008] 1 LNS 216 where the brief facts were that the judgment was obtained on 23 October 1987. Even though interest was calculate from 1 December 1985, it merged into the judgment debt and therefore, the date interest became due was the date of the judgment and not the earlier date. The bankruptcy notice was filed eight years and five months from the date of the judgment.

**[31]** Kang Hwee Gee J held that the bankruptcy notice filed was not out of time following the decision in *Perwira Affin Bank Bhd (supra)* that the language in s. 6(3) of the Limitation Act 1953 is clear. In respect of the claim on the judgment the words used is 'shall not be brought after the expiration of 12 years' and in respect of the claim on the arrears of interest the words used is 'no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.'

## Conclusion

**[32]** The facts of the instant case shows that the judgment was obtained on 17 February 1994. The judgment creditor had dated the bankruptcy notice on 24 August 2005 but the praecipe stamp on the bankruptcy notice showed that it was received by the court on 30 August 2005. In this regard, the date for purposes of ascertaining when it was filed in court should be 30 August 2005. Following the decision of *Perwira Affin Bank Bhd v. Lim Ah Hee (supra)* which stated in the affirmative that s. 6(3) applies to bankruptcy proceedings and while a bankruptcy proceeding may be brought within 12 years of the date of judgment, arrears of interest may only be claimed for a period of six years from the date of judgment.

**[33]** In the instant case the 12 years limitation as envisaged by s. 6(3) of the Limitation Act 1953 would be the date of judgment ie, 17 February 1994 and 12 years thereafter expired on 17 February 2006. Since the bankruptcy notice was issued on the 24 August 2005 or 30 August 2005 which ever is applicable it was still within the 12 years limitation period but the arrears on interest may only be claimed for a period of six years from date of judgment ie, till 17 February 2000.

**[34]** The court is also of the considered view that a bankruptcy proceeding is not 'a writ of execution' within the meaning of O. 46 r. 2 of the RHC and neither is it 'an action upon any judgment' in the light of the definition given in s. 2 of the Limitation Act 1953 which includes a 'suit' or any other proceeding.

**[35]** Based on the reasons as adumbrated above, the court allowed the judgment creditor's appeal (encl. 15) with costs.